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No. 02-1405

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE, L.P.,
F/K/A SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Respondents do not contest the key reasons why this Court should grant the petitions in this case. On the contrary, respondents forthrightly *concede* the crucial fact that there is a clear and direct split on a pure question of law between the D.C. Circuit and the Eighth Circuit, as well as the highest courts of two states. *See* Opp. 1.

Respondents likewise acknowledge that this split involves an "important" issue. *Id.* Crucially, moreover, they do not dispute the Solicitor General's showing that this split is particularly significant because it places the Federal Communications Commission ("FCC") "*in an impossible position*," subject to reversal no matter what it decides in cases arising from Eighth Circuit States. U.S. Pet. 14, No. 02-1386 (emphasis added). More generally, as the Solicitor General correctly explains, the conflicting rulings of the Eighth Circuit and the D.C. Circuit — the latter of which is a proper venue for a challenge to *any* FCC decision on this issue — leave the FCC unable rationally to implement a significant part of the Telecommunications Act of 1996, an "unusually important

legislative enactment." *Reno v. ACLU*, 521 U.S. 844, 857 (1997). In short, the current state of the law "breed[s] enormous uncertainty," warranting immediate intervention by this Court. U.S. Pet. 15.

Respondents likewise do not dispute that this uncertainty is all the more significant because of both the substantial number of States that have laws restricting the ability of political subdivisions to provide telecommunications services, *see* Southwestern Bell Pet. 10 n.10, and the rapidly increasing number of political subdivisions seeking to provide such services, *see*, *e.g.*, Verizon/USTA *Amicus* Br. 5-6, Nos. 02-1238 *et al.* The split of authority in this case thus has substantial real-world consequences, a fact that further fortifies the conclusion that this case merits immediate review.[1]

2. Despite either expressly conceding or failing to challenge all of these crucial points, respondents nevertheless maintain that the Court should deny the petitions for certiorari. They ground their argument nearly exclusively in speculation that the conflict of authority "is well on its way to resolving itself" in favor of the Eighth Circuit's understanding of 47 U.S.C. § 253(a). Opp. 4. That assertion provides no basis to deny certiorari here.

As an initial matter, one could always speculate that a clear circuit split will resolve itself on its own. Without a substantial basis for believing that to be the case, however, such conjecture provides no valid reason for the Court to decline review of what the Solicitor General, the State of Missouri,

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[1] Respondents do contend that this case does not "pose serious issues of federalism" because, in their view, Congress has the *power* to preempt state laws governing political subdivisions. Opp. 2. Respondents are mistaken. The core insight of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), is that the question whether Congress has *exercised* its authority to legislate in areas near the heart of state sovereignty implicates significant federalism concerns. *See id.* at 461 ("Th[e] plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

Southwestern Bell, and even respondents agree is an important issue — an issue, moreover, that is creating substantial uncertainty and preventing the FCC from performing its congressionally assigned duties. *See* 47 U.S.C. § 253(d).

Moreover, respondents' speculation is especially farfetched in this instance. For this split to resolve itself in the manner that respondents' imagine, the D.C. Circuit would have to grant *en banc* review in a future case[2] and overturn its unanimous panel ruling of just a few years ago in *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999). While the possibility of *en banc* review in the D.C. Circuit to reverse a recent and unanimous panel judgment is always exceedingly small, such a result is particularly unlikely here. In fact, there is substantially *more* reason today to believe that the D.C. Circuit would disagree with the Eighth Circuit's judgment than there was when *City of Abilene* was decided.

First, this Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997) — the case on which respondents place near-exclusive reliance — came well before the D.C. Circuit's decision in *City of Abilene*. Thus, as respondents acknowledge, the *City of Abilene* petitioners "relied heavily" on *Salinas* both in reply briefing and at argument before the D.C. Circuit. Opp. 9. On the other hand, at the time the D.C. Circuit decided *City of Abilene*, this Court had *not* yet decided *Raygor v. Regents of University of Minnesota*, 534 U.S. 533 (2002). *Raygor* held that a statutory reference to "any claim" was "general language" that was insufficient to satisfy the plain-statement rule of *Gregory*. *Raygor* thus establishes beyond doubt that the use of the word "any" does not, by itself, satisfy the *Gregory* test, and it strongly supports the conclu-

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[2] It is settled in the D.C. Circuit that only the full court sitting *en banc* can overrule a panel decision. *See, e.g., LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (*en banc*) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court."); *United States v. Kolter*, 71 F.3d 425, 431 (D.C. Cir. 1995) ("This panel would be bound by [a prior] decision even if we did not agree with it.").

sion that the phrase "any entity" in section 253(a) is likewise "general language" that does not speak with the kind of "unmistakabl[e]" clarity required by *Gregory*. 501 U.S. at 460.

Additionally, as the Solicitor General has noted, *see* U.S. Pet. 13 & n.4, just last year the D.C. Circuit determined that the word "entity" as used elsewhere in the Communications Act was ambiguous. *See Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) (discussing the use of that term in 47 U.S.C. § 224 and finding that its meaning depends "upon the context"; "[t]he most that can be said is that § 224(e)(2) is unclear on whether utilities or municipalities count as 'attaching entities'"); *see also Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1068-72 (D.C. Cir. 1997) (finding the word "entity" to be ambiguous in 47 U.S.C. § 275(a)(2)). Accordingly, the D.C. Circuit has now concluded on multiple occasions that the term "entity" as used in that statute is subject to multiple interpretations. It is simply not reasonable to suggest that the D.C. Circuit will now grant *en banc* review in order to reverse a prior, unanimous panel decision and declare that the term "entity" is unmistakably clear in the context of section 253(a).

Finally, the two "considerations" highlighted by respondents in support of their view that the "D.C. Circuit might decline to follow *Abilene*," Opp. 15, are unpersuasive. Respondents point first to *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), which they claim shows that Congress intended to "intrude[] upon State authority." Opp. 15. *Iowa Utilities Board*, however, dealt with Congress's intent in 47 U.S.C. §§ 251 and 252, which provide express federal standards governing wholesale arrangements between telecommunications providers and supersede inconsistent state requirements. *See* 47 U.S.C. § 251(d)(3)(B). The Court simply concluded that the FCC was authorized to issue regulations implementing these new federal requirements governing wholesale arrangements between carriers and thus that state public utility commissions would have to adhere to those federal rules in implementing the federal statute. *See* 525

U.S. at 378 n.6 (finding that the applicable "presumption" was that "a federal program administered by 50 independent state agencies is surpassing strange"). *Iowa Utilities Board* in no way resolves the wholly distinct question whether, in section 253, Congress intended to strip States of the right to control the activities of their own political subdivisions.

Respondents' claims about the D.C. Circuit's alleged misconception in *City of Abilene* about the effect of its decision on "municipal electric utilities," Opp. 17, similarly have no relevance to the issue presented here. In fact, the FCC expressly concluded in this case that a "municipally-owned utility [that] has an independent corporate identity that is separate from the state . . . can be considered an entity for which section 253 preemption is available." Southwestern Bell Pet. App. 14a. Accordingly, neither this case nor the D.C. Circuit case has anything to do with municipal utilities that are distinct from political subdivisions, and respondents' arguments about such utilities are beside the point.

3. Respondents also argue briefly that the Eighth Circuit's resolution of this issue is correct, and that the D.C. Circuit's contrary conclusion is wrong. *See* Opp. 18-22. Of course, even if respondents' analysis of the merits were correct, their argument is irrelevant to the compelling reasons for the Court to grant certiorari here, including the clear circuit split, the important question of federal statutory law, and the debilitating effect of the split on the FCC's ability to resolve section 253(a) issues.

In any event, respondents' argument is unpersuasive even on its own terms. Respondents' argument relies on Congress's use of the adjective "any" in section 253(a), without grappling with the fact that that adjective modifies a noun – "entity" – that is far from explicit as to whether it applies to political subdivisions of a State. It is plain that, by referring to "entities," Congress intended to ensure that *private* telecommunications carriers could enter local telecommunications markets to compete with existing private providers. *See* Pet. 13-14; *see also* Opp. 3 (suggesting that Congress "ex-

press[ed] a preference for private-sector leadership" in deploying new telecommunications facilities). It is not similarly clear that Congress intended the use of the term "entity" to strip States of their long-held authority to determine the activities of political subdivisions. As Southwestern Bell has explained, Pet. 14-15, the term "entity" is frequently defined as a "thing with distinct and independent existence." Because political subdivisions have long been understood not to be distinct from the State itself, there is significant reason to doubt whether Congress intended to include them in the class of entities covered by section 253(a). Accordingly, regardless of whether the word "any" is read broadly, as respondents argue it should be, there is ambiguity in whether the word "entity" covers political subdivisions. That ambiguity necessarily undermines the claim that Congress spoke with the unmistakable clarity required by *Gregory*.

The fact that it is simply not clear that Congress intended such a result is magnified when section 253(a) is placed in the context of the rest of section 253, as it must be. *See, e.g.*, *Raygor*, 534 U.S. at 545-46 (referring to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (internal quotation marks omitted). In particular, respondents never explain why section 253(a) should be read broadly to intrude on the fundamental state right to control the activities of its political subdivisions when sections 253(b) and (c) evince a congressional intent to preserve significant state policies. As Southwestern Bell has explained, Pet. 14, without any response from respondents, it would be most peculiar for Congress to preserve state policies so carefully in sections 253(b) and (c), and at the same time preempt the States' long history of exercising "absolute discretion" in determining the powers conferred on political subdivisions. *Sailors v. Board of Educ.*, 387 U.S. 105, 107-08 (1967). Under *Gregory*, one could conclude that Congress had such an intent only if section 253(a) spoke with significantly more clarity than it does.

Salinas does not undermine any of these points. There, the statute referred to "any business, transaction, or series of transactions." *See* 522 U.S. at 56. As in *Raygor*, the Court looked at the statute as a whole, as well as its history, to determine that the language at issue was sufficiently "unambiguous" in covering the transaction at issue — the receipt of a bribe in exchange for allowing improper visits to a federal prisoner — that it would "press statutory construction to the point of disingenuous evasion" to reach any other conclusion. *Id.* at 60 (internal quotation marks omitted). *Salinas* was thus grounded in the context of the specific statutory language at issue and the history of amendments to that language. *Salinas* says nothing about the very different statutory circumstances presented here; it offers no guidance as to whether the term "entity" is unambiguous as applied to political subdivisions, especially as used in the context of section 253(a).

In the end, respondents themselves acknowledge that their claim on the merits turns on whether section 253(a) should be "interpreted *broadly*." Opp. i (question presented) (emphasis added). Under *Gregory*, however, if a federal statute is subject to a "broad" and a "narrow" construction, it must be read narrowly so as to avoid intruding on traditional state prerogatives. *See, e.g.*, *Gregory*, 501 U.S. at 464 (Court must be "absolutely certain that Congress intended" an "intrusive exercise[]" of its power over the States). Thus, even assuming that respondents' construction of section 253(a) were a plausible one, it is not mandated with the clarity required by this Court's precedents, and thus it is incorrect. *See id.* at 467 (declining to conclude that state judges are included within the relevant statute because it was not "plain to anyone reading the Act that it covers judges").

The Eighth Circuit's decision adopting respondents' "broad" construction is similarly incorrect, and certiorari should be granted to resolve the circuit conflict created by that decision on this important issue of federal statutory law.

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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